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Keynote Address: The Moral Dimension of Employment Dispute Resolution

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KEYNOTE ADDRESS: THE MORAL DIMENSION OF EMPLOYMENT DISPUTE RESOLUTION

THEODORE J. ST. ANTOINE[†]

INTRODUCTION

Dispute resolution may be viewed from the perspective of economics or negotiation or contract law or game theory or even military strategy. In this Article, I should like to consider employment dispute resolution in particular from the perspective of morality. I do not necessarily mean “morality” in any religious sense. By “morality” here I mean a concern about the inherent dignity and worth of every human being and the way each one should be treated by society. Some persons who best exemplify that attitude would style themselves secular humanists. Nonetheless, over the centuries religions across the globe have played a significant role in dispute resolution (as well as at times, regrettably, dispute provocation). My hunch is that even now many individuals have had their interest triggered in employment issues generally, and employment dispute resolution in particular, by the moral teachings of one religion or another. I am going to precede my broader remarks with a personal recital of what brought me into the world of labor and employment relations and dispute resolution. I hope my account will resonate in different ways with the experiences of many readers. My impression is that, like cancer researchers and classical musicians, many if not most persons are drawn to the labor and employment field for reasons of principle and not primarily for personal material gain.

My father owned a music store and a radio station, and was president of the local board of trade in a small town in northern Vermont, St. Albans, population 8,000. One might say he was a big frog in an extremely tiny puddle. In any event, he

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overextended himself during the Great Depression and lost everything. For me, sensing my own lack of business skills, it provided a harsh but simple lesson: Steer clear of anything having to do with entrepreneurship. I resolved to become a professional person, a corporate lawyer on Wall Street, and make \$100,000 a year (we are talking 1940s' dollars). But then I went to Fordham College in New York City and fell into the clutches of the Jesuits.

I still vividly remember the day this earnest, even zealous, young Jesuit walked into class and distributed a mimeographed sheet. It had three columns. In the first column were excerpts from the social encyclicals of Popes Leo XIII and Pius XI. In the second were excerpts from the speeches of Walter Reuther, the fiery liberal President of the United Auto Workers. The third column contained statements by the then-President of the U.S. Chamber of Commerce. The Popes and Walter Reuther could have had the same ghostwriter. The Chamber President had a somewhat different take on matters. I sat there stunned, struck by a lightning bolt—somewhat like Saul on the road to Damascus. I was headed in the wrong direction. Instead, I would have to become a lawyer for a union like Walter Reuther's. Later, I like to think I became more open-minded and realized that labor organizations were essentially a means to an even nobler end—the representation of workers' interests in dealing with management and peacefully resolving disputes. For a while I did represent labor unions, primarily the AFL-CIO itself. But eventually I became a labor arbitrator, in addition to my day job as a labor and employment law professor.

Here I am first going to take a quick tour of some of the world's great texts, sacred and profane, on dispute resolution, especially through methods chosen by the parties themselves. Then I shall look at a few of the systems that have been created across the globe to settle employment disputes, and what they may have to teach us about the most appropriate procedures. Because so many courts or public tribunals around the world have become overwhelmed by the volume of today's litigation, much of my emphasis will be on alternative dispute resolution ("ADR"). Finally, I should like to venture a few thoughts on what I consider one of the profound, persisting problems in the world

of work, as a prime example of the sort of basic human conflict that we must devise a means to resolve, or perhaps risk the very survival of our species.

I. THE MORALISTS SPEAK

Aristotle may be as good a place as any to begin. He defined man as a “political animal” operating by “rational principle.”¹ Aristotle bid adversaries “to settle a dispute by negotiation and not by force; to prefer arbitration to litigation—for an arbitrator goes by the equity of a case, a judge by the strict law, and arbitration was invented with the express purpose of securing full power for equity.”² In the Judeo-Christian tradition, one might fairly speak of Solomon as the first great arbitrator.³ He even metaphorically “split the baby”—today a common canard about supposedly pandering arbitrators, even though the middle-ground solution may be justified by the particular circumstances in many cases.⁴ St. Paul counseled the early Christians to submit their disputes to arbitration rather than to the courts.⁵ In modern times, Pope Leo XIII in the encyclical *Rerum Novarum* urged the formation of associations “consisting either of workmen alone, or of workmen and employers together.”⁶ He went on: “Should it happen that either a master or a workman believes himself injured, nothing would be more desirable than that a committee should be appointed, composed of reliable and capable members of the association, whose duty would be, conformably with the rules of the association, to settle the dispute.”⁷

The great Eastern religions all ordain a prominent role for mediation or arbitration in dispute settlement. Early Buddhist monks would refer their more unyielding disputes to arbitration

¹ Richard McKeon, *Introduction* to ARISTOTLE, THE BASIC WORKS OF ARISTOTLE vii, xxviii (Richard McKeon ed., 1941); ARISTOTLE, *Nicomachean Ethics*, in THE BASIC WORKS OF ARISTOTLE, *supra* at 935, 943.

² ARISTOTLE, *Rhetoric*, in THE BASIC WORKS OF ARISTOTLE, *supra* note 1, at 1317, 1372.

³ 1 *Kings* 3:16–28 (New King James).

⁴ *See id.*

⁵ 1 *Corinthians* 6:5.

⁶ POPE LEO XIII, ENCYCLICAL LETTER *RERUM NOVARUM* ¶ 49 (1891) [hereinafter *RERUM NOVARUM*], available at http://www.vatican.va/holy_father/leo_xiii/encyclicals/documents/hf_l-xiii_enc_15051891_rerum-novarum_en.html.

⁷ *Id.* at ¶ 58.

by the elders of a neighboring monastery.⁸ The *Vinaya*, containing the teachings of the Buddha, prescribed arbitration as one of the means for resolving monastic issues.⁹ Hinduism is individualistic and nonhierarchical, and emphasizes the relativity of truth and the importance of context in determining rights.¹⁰ It lends itself naturally to a variety of ADR techniques outside the conventional legal system. The *Bhagavad Gita*, a sacred Hindu text, is literally a justification for warfare to redress wrongdoing, but Gandhi read it allegorically as celebrating the triumph of good over evil and advocating the peaceful settlement of disputes.¹¹ Finally, to bring the relevance of these ancient religious teachings right up to date, a Florida judge ruled in March 2011 that he would decide whether the parties in a lawsuit against a Tampa mosque had properly followed the mandates of the *Qur'an* in obtaining an arbitration decision from an Islamic scholar, and were thus bound by their agreement to arbitrate rather than sue in a civil court.¹² Says the *Qur'an*: "The believers are but brothers, so make settlement between your brothers."¹³

Some leading contemporary jurists and moral philosophers, like John Rawls and Ronald Dworkin, have turned away from utilitarianism and legal positivism and have placed increasing emphasis on objective moral values. Rawls would have us bound by a hypothetical social contract entered into with all parties acting equally behind "a veil of ignorance," not

⁸ MERRIAM-WEBSTER'S ENCYCLOPEDIA OF WORLD RELIGIONS 150–51 (1999).

⁹ *Id.* at 151; *Crimes and Punishments (Buddhist)*, in ENCYCLOPAEDIA OF RELIGION AND ETHICS 260, 261 (James Hastings et al. eds., 1981).

¹⁰ SWAMI BHASKARANANDA, THE ESSENTIALS OF HINDUISM: A COMPREHENSIVE OVERVIEW OF THE WORLD'S OLDEST RELIGION 185–89 (2002); STEPHEN KNAPP, THE POWER OF THE DHARMA: AN INTRODUCTION TO HINDUISM AND VEDIC CULTURE 1–5 (2006); see GAVIN D. FLOOD, AN INTRODUCTION TO HINDUISM 5–22 (1996). See also Arnold M. Zack, *Hindu DR: Developing a Global Program for the Hare Krishnas*, DISP. RESOL. MAG., Spring 2004, at 9, 9.

¹¹ In the *Gita*, the Lord Krishna is charioteer for Arjuna, the chief of one rival army who hesitates to go into battle and kill his own kinfolk. Krishna declares that souls are eternal and reminds Arjuna of his duties as a member of a warrior caste. BHAGAVAD-GITA (Sir Edwin Arnold trans., 1964). Gandhi's interpretation is set forth in Louis Fischer, *The Life of Mahatma Gandhi* 29–37 (1983); Varun Soni, *Religion, World Order, and Peace: A Hindu Approach*, CROSS CURRENTS, (United Nations) Sept. 2010, available at <http://www.freepatentsonline.com/article/Cross-Currents/239197491.html>.

¹² See William R. Levesque, *Judge Issues Opinion in Islamic Law Case*, ST. PETERSBURG TIMES, Mar. 23, 2011, at 1B.

¹³ QUR'AN 49:10 (Muhammad Asad trans.).

knowing what place they might occupy in society or what intellectual, physical, financial, or other assets they would possess.¹⁴ Dworkin insists on the unity of value: Personal ethics engender political morality and principles of social justice.¹⁵ The dignity and self-respect we must accord ourselves imposes the responsibility for treating others in the same spirit.¹⁶

As an academic, I naturally like to think that ideas have consequences. But as something of a pragmatist, I am less concerned about the theoretical validity of theses like those of Rawls and Dworkin and more interested in the fruitful thinking they may generate about the appropriate means for resolving human conflict. That is especially true regarding disputants when one is the stronger party and the other the weaker, as with most employers and employees. How in fact are employment dispute resolution systems constructed and operated? How should they be? To those questions I now turn.

II. EMPLOYMENT DISPUTE RESOLUTION SYSTEMS: SOME PRINCIPLES

My fellow authors in this Symposium will deal in much more depth with the various systems for settling employment disputes around the world. I am going to provide a brief introduction to what seem to me the variety of ways that people seek to dispose of human conflict, and the questions to be answered in setting up procedures for doing so. Throughout, I shall try to keep a focus on the relevance of moral values.

We start with substantive rules. The state—government—establishes a body of general law applicable to a wide range of disputes. Broad principles of Anglo-American law—property, contract, tort, criminal law, even antitrust law—once covered disputes between employers and employees in the United States.¹⁷ Until well into the 20th century, law governing union-management relations and employment was largely the province of the individual states. But the inappropriateness of many of

¹⁴ JOHN RAWLS, *A THEORY OF JUSTICE* 136–42 (rev. ed. 2000).

¹⁵ See RONALD DWORKIN, *JUSTICE FOR HEDGEHOGS* 1–4, 7–8, 11, 13–15, 112–13, 191–92, 419–23 (2011).

¹⁶ See *id.* at 203–09, 320–21.

¹⁷ See WILLIAM E. FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT* 38–39, 59–97 (1991); CHRISTOPHER L. TOMLINS, *THE STATE AND THE UNIONS: LABOR RELATIONS, LAW, AND THE ORGANIZED LABOR MOVEMENT IN AMERICA, 1880-1960* 32–65 (1985).

these principles in the labor and employment context was gradually recognized. A new body of specialized law was developed, with the federal government assuming a predominant role in the private sector in the United States.¹⁸ We speak of "labor law" as governing employees' right to organize and strike and relations between employers and labor organizations,¹⁹ and of "employment law" as governing relations between employers and individual employees, whether unionized or not.²⁰

Employment law in turn could be classified as providing for employees' general welfare, by regulating minimum wages, maximum hours and child labor,²¹ old-age assistance and unemployment compensation,²² occupational safety and health,²³ and pension and other retirement benefits.²⁴ Or employment law could prohibit discrimination by employers against employees because of their race, sex, religion, ethnicity,²⁵ age,²⁶ physical or mental disability,²⁷ or other arbitrary grounds.²⁸ The United States, however, has not managed the morally mandated step (ordained by the International Labour Organization), taken by every other major industrial democracy in the world, to prohibit the discharge of employees without some justifiable cause.²⁹

¹⁸ See generally TOMLINS, *supra* note 17, at 103–47; ARCHIBALD COX, LAW AND THE NATIONAL LABOR POLICY 1–2 (1960); HARRY H. WELLINGTON, LABOR AND THE LEGAL PROCESS 23–26 (1968). State labor law generally remains controlling in the public sector (state and local government employees), in purely intrastate employment, and in most of workers' compensation for job-related disabilities. Unemployment compensation is a joint federal-state endeavor. There is dual federal-state jurisdiction in certain areas, such as civil rights or antidiscrimination legislation in employment.

¹⁹ See, e.g., Railway Labor Act of 1926, 45 U.S.C. §§ 151–188 (2006); Labor Management Relations Act of 1947, 29 U.S.C. §§ 141–167, 171–197 (2006).

²⁰ See *infra* notes 21–27.

²¹ Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–219.

²² Social Security Act of 1935, 42 U.S.C. §§ 301–1397.

²³ Occupational Safety and Health Act (OSHA) of 1970, 29 U.S.C. §§ 651–678.

²⁴ Employee Retirement Income Security Act (ERISA) of 1974, Pub. L. No. 93-406, 88 Stat. 829 (current version at 29 U.S.C. §§ 1001–1461).

²⁵ Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17.

²⁶ Age Discrimination in Employment Act (ADEA) of 1967, 29 U.S.C. §§ 621–634.

²⁷ Americans with Disabilities Act (ADA) of 1990, Pub. L. No. 101-336, 104 Stat. 327 (current version at 42 U.S.C. §§ 12111–12213).

²⁸ Various state statutes and local ordinances prohibit employment discrimination on additional grounds, such as sexual orientation, height, weight, and marital status.

²⁹ General Conference of the ILO, C158 Termination of Employment Convention, June 2, 1982, art. 4. See also Comm. on Labor & Emp't Law, *At-Will*

Finally, substantive rules governing employment may be established privately, by management acting unilaterally, employers consulting or contracting with their employees individually, or with labor unions representing their employees to produce collective agreements.

How are all these state-created or privately created rules, and the rights flowing from them, to be enforced? That is the crucial item on the agenda before us.

Again, the general/special and the governmental/private dichotomies confront us. When the substantive legal rules were primarily the general law applicable to the whole populace, so too their enforcement was the function of the usual civil and criminal courts. But alongside this official regulation there grew up in the United States (and Canada) a significant system of private arbitration for the interpretation and administration of collective bargaining agreements.³⁰ Unions and employers would mutually select an impartial third party, the arbitrator, to resolve their contractual disputes. Originally, this self-governing system depended almost entirely on voluntary compliance for its effectiveness.³¹ As federal statutory law began increasingly to regulate labor and employment relations, however, the courts were authorized to enforce both agreements to arbitrate and the awards issued by arbitrators.³² At the same time, a crazy quilt of governmental enforcement machinery was established, with a

Employment and the Problem of Unjust Dismissal, in 36 REC. OF ASS'N OF B. OF CITY OF N.Y. 170, 175 (1981). In all, about sixty nations prohibit discharge without cause, including the European Union, Sweden, Norway, Japan, Canada, and others in South America, Africa, and Asia. See Theodore J. St. Antoine, *The Making of the Model Employment Termination Act*, 69 WASH. L. REV. 361, 382 (1994).

³⁰ See R.W. FLEMING, *THE LABOR ARBITRATION PROCESS* 1–14 (1965); Dennis R. Nolan & Roger I. Abrams, *American Labor Arbitration: The Early Years*, 35 U. FLA. L. REV. 373, 374–75 (1983); Charles J. Morris, *Historical Background of Labor Arbitration: Lessons from the Past*, in *LABOR ARBITRATION: A PRACTICAL GUIDE FOR ADVOCATES* 3, 5–13 (Max Zimny et al. eds., 1990); ELKOURI & ELKOURI, A.B.A. SEC. LABOR & EMP'T LAW, *HOW ARBITRATION WORKS* 5 n.15 (Alan Miles Ruben et al. eds., 6th ed. 2003).

³¹ Early English and American judges were hostile to agreements to arbitrate as an effort to “oust the courts of jurisdiction.” See 15 GRACE M. GIESEL, *CORBIN ON CONTRACTS* § 83.4 (Joseph M. Perillo ed., rev. ed. 2011).

³² See *Textile Workers Union of Am. v. Lincoln Mills of Ala.*, 353 U.S. 448, 455 (1957); *United Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564, 567–68 (1960); *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 577–78 (1960); *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 596 (1960). The last three are known collectively as the *Steelworkers Trilogy*. See also Federal Arbitration Act of 1925, 9 U.S.C. §§ 1–16 (2006).

whole host of administrative agencies created to make initial decisions regarding disputes under a wide range of statutes.³³ Almost invariably these rulings are subject to judicial review or ultimate determination. We are still trying to sort out the dividing lines between the roles of administrative agencies, courts, and arbitrators.

Other countries take many different tacks. For example, in the United Kingdom, major contractual claims are generally brought in the high courts or the county courts while statutory claims and lesser contractual claims are brought in the three-person Employment Tribunals (composed of one experienced lawyer, a union or employee representative, and an employer representative).³⁴ Statutory claims include wrongful dismissal, minimum wages, health and safety violations, many types of discrimination, antiunion conduct, and claims under European Union directives.³⁵ Decisions of both the courts and the Employment Tribunals are ultimately subject to appeal to the Court of Appeal and the Supreme Court (formerly the Appellate Committee of the House of Lords). There may also be a reference to the European Court of Justice on a relevant point of law.³⁶

The traditional U.K. approach to collective agreements was that, unlike the situation in the United States, they were not legally binding contracts but only "gentlemen's agreement[s]," except to the extent that their terms were incorporated into individual employees' contracts of employment.³⁷ Arbitration has never played the same pervasive role in the U.K. as it has in the U.S. and Canada regarding the interpretation and application of existing collective agreements, with disciplinary grievances being the largest single category of cases.³⁸ Since April 2009, however, Employment Tribunals in the U.K. have been directed to

³³ See *supra* notes 21–27, and the varying remedial processes provided for the statutes cited.

³⁴ Paul Callaghan, *United Kingdom*, in *IA INTERNATIONAL LABOR AND EMPLOYMENT LAWS* 8-1, 8-4 to 8-5 (William L. Keller et al. eds., 3d ed. 2009).

³⁵ *Id.* at 8-5 to 8-6.

³⁶ *Id.* at 8-6.

³⁷ *Id.* at 8-21 to 8-22, 8-77 to 8-78; OTTO KAHN-FREUND, *LABOUR AND THE LAW* 124–31 (1972).

³⁸ Dennis R. Nolan & Roger I. Abrams, *Trends in Private Sector Grievance Arbitration*, in *LABOR ARBITRATION UNDER FIRE* 42, 59 (James L. Stern & Joyce M. Najita eds., 1997); Charles J. Coleman, *The Arbitrator's Cases: Number, Sources, Issues, and Implications*, in *LABOR ARBITRATION IN AMERICA: THE PROFESSION AND PRACTICE* 85, 86–87 (Mario F. Bognanno & Charles J. Coleman eds., 1992).

determine in disciplinary proceedings whether employers followed a “fair procedure” in accordance with the standards set forth in the Code of Practice on Discipline and Grievance issued by the Advisory, Conciliation and Arbitration Service (“ACAS”).³⁹ The Service also provides the option of “final and binding” ACAS arbitration of unfair dismissal claims, with the waiver of rights to a tribunal hearing.⁴⁰

Historically, employers and trade unions in the U.K. have been more likely to resort to what Americans would call “interest arbitration,” that is, the setting of the terms of a new or renewed agreement, rather than so-called “rights” or grievance arbitration concerning claims under a currently applicable agreement.⁴¹ Contrary to most Americans’ attitudes, union and management representatives in the U.K. told me in the late 1950s that they had more confidence in the capacity of labor economists and other industrial relations experts to deal with the “big picture” than with a particular shop-floor dispute in a given plant. I should like to learn whether those positions have changed because of the increasingly competitive global economy and the desire to resolve grievances faster, cheaper, and without strikes, or for such other possible reasons as a shift in the balance of power between management and the trade unions.

Like the United Kingdom, France and Germany have specialized labor tribunals or courts but their jurisdictions are different. In France, the labor tribunals’ jurisdiction is limited to disputes based on individual contracts of employment, including dismissals.⁴² Labor tribunals are composed of lay magistrates, with an equal number chosen by employees and employers.⁴³ Strikes and disputes arising under collective agreements are handled by the regular courts.⁴⁴ Major disputes may be retried

³⁹ Callaghan, *supra* note 34, at 8-7 to 8-14.

⁴⁰ ACAS, THE ACAS ARBITRATION SCHEME FOR THE RESOLUTION OF UNFAIR DISMISSAL DISPUTES (ENGLAND AND WALES) 8, *available at* http://www.acas.org.uk/media/pdf/i/b/arbitration_guide_1.pdf. ACAS states that awards under its system are “not legally binding.” *Collective Arbitration*, ACAS, <http://www.acas.org.uk/index.aspx?articleid=2038> (last visited Oct. 9, 2012).

⁴¹ *See, e.g.*, SEYFARTH ET AL., LABOR RELATIONS AND THE LAW IN THE UNITED KINGDOM AND THE UNITED STATES 127–28 (1968); H.A. CLEGG, THE SYSTEM OF INDUSTRIAL RELATIONS IN GREAT BRITAIN 256–57 (1970).

⁴² JEAN-PHILIPPE ROBÉ & VIRGINIE BARNIER, *France, in* IA INTERNATIONAL LABOR AND EMPLOYMENT LAWS, *supra* note 34, at 4-1 to 4-2.

⁴³ *Id.* at 4-2.

⁴⁴ *Id.*

by a court of appeals, with a final appeal only on points of law to the labor division of the Supreme Court.⁴⁵ In addition, under French law, the collective agreement, the parties, or the Labor Minister may invoke conciliation or mediation, or the parties themselves may select an arbitrator to render a binding decision.⁴⁶ Many statutory provisions in the French Labor Code are enforced through administrative or criminal sanctions.⁴⁷

German labor courts exercise both trial and appellate jurisdiction, and at least theoretically are empowered to deal with all disputes of any kind between employees and employers.⁴⁸ In practice, however, most collective bargaining agreements provide that disputes over their interpretation and application will be resolved through arbitration.⁴⁹ Arbitration panels typically consist of an equal number of employer and employee designees and a neutral third-party chair.⁵⁰ In Germany, collective agreements also commonly authorize "interest" arbitration to set the terms of a new contract if the parties themselves cannot reach agreement after negotiation and mediation.⁵¹

On the other side of the world, China has engaged in a major overhaul of its labor laws in the last half-decade. Employers are now required to have a written contract of employment with each of their employees.⁵² Employers may also conclude collective contracts with unions or other employee representatives, but these are nowhere near as important as a practical matter as the individual contracts. Independent unions are illegal in China.⁵³ All unions must belong to the All China Federation of Trade Unions (ACFTU), under the control of the Chinese Communist Party ("CCP"), and they have tended in the past to serve more as intermediaries between employers and employees rather than as

⁴⁵ *Id.* at 4-3.

⁴⁶ *Id.* at 4-34 to 4-35.

⁴⁷ *See, e.g., id.* at 4-47 to 4-48, 4-60 to 4-65, 4-67 (discussing wages, discrimination, occupational safety and health, and immigration, respectively).

⁴⁸ Walter Ahrens & Mark S. Dichter, *Germany*, in *IA INTERNATIONAL LABOR AND EMPLOYMENT LAWS*, *supra* note 34, at 5-1, 5-24 to 5-26.

⁴⁹ *Id.* at 5-58.

⁵⁰ *Id.* at 5-59.

⁵¹ *Id.*

⁵² Andreas Lauffs, *China*, in *IA INTERNATIONAL LABOR AND EMPLOYMENT LAWS*, *supra* note 34, at 55-1, 55-1.

⁵³ *Id.* at 55-4 to 55-5.

true advocates for the employees.⁵⁴ That may change in the future. In any event, China places much emphasis on resolving employment disputes through consultation and mediation within business enterprises. Over the last two decades, however, there has been increasing resort to formal arbitration and court litigation.⁵⁵ Chinese arbitration is government-established, with the CCP in ultimate control.⁵⁶ Westerners would likely think of it as a system of industrial tribunals, operating on a local basis, rather than the party-established arbitration we are familiar with. Most of the so-called arbitrations in China are heard by a single government appointee, but panels of three may be used in the more significant cases.⁵⁷ By far the majority of disputes involve individual contracts, not collective agreements.⁵⁸

American observers are inclined to be skeptical about the fairness of a system pitting individual employees against a state-owned enterprise (SOE) before a CCP-controlled dispute resolution system. But employees actually win the vast majority of the arbitrations.⁵⁹ Moreover, under new dispute resolution legislation, employees may, as previously, appeal most adverse arbitral decisions to the courts for a *de novo* determination, while in most instances employers can now appeal only on relatively narrow grounds, such as fraud or corruption, denial of due process, violation of law, and the like.⁶⁰ The rub for employees when the cases do go to court, however, is that judicial proceedings may consume a couple of years, and private fly-by-night employers may be long gone when a final enforceable judgment is obtained.

⁵⁴ Theodore J. St. Antoine, *Teaching ADR in the Labor Field in China*, 25 COMP. LAB. L. & POL'Y J. 105, 108 (2003) [hereinafter St. Antoine, *Teaching ADR*].

⁵⁵ *Id.* at 106; Lauffs, *supra* note 52, at 55-16.

⁵⁶ David T. Wang, Comment, *Judicial Reform in China: Improving Arbitration Award Enforcement by Establishing a Federal Court System*, 48 SANTA CLARA L. REV. 649, 654 (2008).

⁵⁷ Lauffs, *supra* note 52, at 55-17.

⁵⁸ St. Antoine, *Teaching ADR*, *supra* note 54, at 109.

⁵⁹ Lauffs, *supra* note 52, at 55-16.

⁶⁰ (《中华人民共和国劳动争议调解仲裁法》) [Laws of the People's Republic of China on Mediation and Arbitration of Labor Disputes] (promulgated by Standing Committee of the National People's Congress, Dec. 29, 2007, effective May 1, 2008) arts. 48, 49, available at <http://www.lawinfochina.com/display.aspx?id=6584&lib=law>. See also Yun Zhao, *China's New Labor Dispute Resolution Law: A Catalyst for the Establishment of a Harmonious Labor Relationship?*, 30 COMP. LAB. L. & POL'Y J. 409, 422 (2009).

What has all this to do with morality? Unlike the occasional eminent philosopher, I do not believe that every question of choice lends itself to a single correct moral answer. Nonetheless, constructing a system of dispute resolution, especially when the parties have unequal bargaining power as is usually true of employers and employees, implicates moral values profoundly. The dignity and worth of the weaker party, the employee, must be recognized and respected. Due process requires a "level playing field" that will place both parties on an equal footing in seeking a fair and equitable outcome in their dispute.

The cause of self-determination is advanced, and the special circumstances of particular relationships are more appropriately treated, if the disputing parties themselves have a hand in formulating a system to deal with their controversy. There is thus much to be said for parties with ongoing relations like employers and employees agreeing voluntarily on a mutually acceptable settlement procedure, such as arbitration by a neutral or impartial third party. At the same time, governmental authorities must stand ready to ensure that the private arrangements are truly just in their structure and operation, and to step in with default mechanisms if the parties cannot agree on a system or if there is a failure to comply with the one created. As I see it, therefore, the morally optimal solution is a privately negotiated dispute resolution process whose fairness and effectiveness are subject to the state's oversight and enforcement.

The National Academy of Arbitrators, the professional organization of some 630 leading labor and employment arbitrators in the United States and Canada, has proposed to the U.S. Congress that any legislation dealing with the arbitration of legal claims should contain the following due process guarantees for systems established through so-called adhesion contracts (form contracts imposed by employers and not collectively or individually negotiated):

- Employees must have the right to be represented by persons of their own choosing;
- the time limit within which the claim must be brought is no less than the time limit applicable to the law under which the claim arises;
- the parties must have access to prehearing discovery adequate for the disposition of the claim but not excessive or abusive;

- group or class claims are allowed when that is reasonably necessary for the vindication of the rights at stake;
- the arbitrator is mutually selected by the parties or is designated by a neutral agency and the arbitrator must disclose any conflict of interest;
- the hearing is held at a location and time that will reasonably accommodate the employee's ability to be present and participate;
- the fees and expenses of the arbitrator are borne by the employer except for a filing fee not to exceed that for a civil action in federal court;
- the arbitrator has the "authority to award all relief, legal and equitable, that would be available in civil litigation under the applicable law;" and
- the arbitrator must provide a written opinion and award, with findings of fact and conclusions of law, applying the same standards as would a court.⁶¹

To my eyes, procedural requirements like those are of the very essence of fairness and equity, and as such constitute a moral imperative.

Governmentally-established dispute resolution systems raise other questions. To cite just one area, there has been an extraordinary proliferation of courts and agencies dealing with employment issues in every country we have mentioned and in the rest of the world as well. Now, there may be some advantages in having judges and administrators become specialists in different areas of the law. But the individual employee or employer seeking relief confronts a bewildering assortment of choices, often overlapping and with uncertain boundary lines. And a decision in one forum does not necessarily end the controversy. In the United States, for example, the National Labor Relations Board ("NLRB") has initial jurisdiction over antiunion discrimination and the Equal Employment Opportunity Commission ("EEOC") has initial jurisdiction over discrimination on such categorical grounds as race, sex, religion, ethnicity, age, and disability. Yet an issue of race or sex discrimination before the EEOC can easily become an issue of unfair union representation before the NLRB (not to mention the

⁶¹ See Letter from William H. Holley, Jr., President, Nat'l Acad. of Arbitrators, to Russ Feingold, U.S. Senator (Oct. 13, 2009) app. 7 (on file with the author and with the *St. John's Law Review*).

basis for a court suit).⁶² Especially as the crasser, more blatant forms of employment discrimination diminish over time, we might well consider the consolidation of these two agencies into a single National Labor and Employment Relations Board. That is just one illustration of the proliferation problem in one country. Fairness to all parties suggests the need to consider an appropriate simplification of these confusing administrative and judicial forums and procedures.

III. INTERNATIONAL IMPLICATIONS—CORE LABOR STANDARDS AND A LIVING WAGE

As previously noted, much of national substantive law has a moral underpinning. The rules governing the global market should be similarly grounded. In a keynote speech at a conference on globalization held at the Michigan Law School a few years ago, Robert L. Kuttner pointed out that all the advanced economies in today's world have evolved into what can fairly be described as *mixed* economies.⁶³ While the systems remain basically capitalist, they are tempered by governmental regulation, not only to ensure equity but also to enhance efficiency. The lesson we have learned is that unregulated capitalism is inherently unstable. Thus, in the late 19th and early 20th centuries, the United States proceeded to adopt antitrust laws, securities regulation, trade regulation, and labor laws to avert recurrent economic downturns. Kuttner went on that international markets, left to themselves, are especially volatile. He then asked the provocative question: "By what alchemy does the market system, which is not optimal as a laissez-faire system within nations, somehow become optimal as a laissez-faire system between or among nations?"⁶⁴

⁶² See, e.g., *Local Union No. 12, United Rubber, Cork, Linoleum & Plastic Workers of Am. v. NLRB*, 368 F.2d 12, 14, 19 (5th Cir. 1966); *NLRB v. Local No. 106, Glass Bottle Blowers Ass'n*, 520 F.2d 693, 694 (6th Cir. 1975). See generally Bernard D. Meltzer, *The National Labor Relations Act and Racial Discrimination: The More Remedies, the Better?*, 42 U. CHI. L. REV. 1 (1974); Michael I. Sovern, *Race Discrimination and the National Labor Relations Act: The Brave New World of Miranda*, in PROCEEDINGS OF N.Y.U. SIXTEENTH ANNUAL CONFERENCE ON LABOR 3, 3 (1963); John C. Truesdale, *The NLRB and the Duty*, in THE CHANGING LAW OF FAIR REPRESENTATION 208, 208–09 (Jean T. McKelvey ed., 1985).

⁶³ Robert L. Kuttner, *Development, Globalization, and Law*, 26 MICH. J. INT'L L. 19, 19 (2004).

⁶⁴ *Id.* at 21.

In 1998, the International Labor Organization (“ILO”) made an effort to counter this laissez-faire philosophy by securing the commitment of its 177 member nations, without dissent, to four “core” labor standards. As spelled out in the ILO’s *Declaration on Rights at Work*, they are:

- freedom of association and the right to collective bargaining;
- elimination of all forms of forced or compulsory labor;
- abolition of child labor; and
- elimination of employment and occupational discrimination.⁶⁵

That is a noble set of standards but it suffers from at least two major deficiencies. First, it omits any provision regarding labor costs—a minimum or living wage.⁶⁶ That of course would not mean a single worldwide minimum pay rate but rather one that took into account the variations in living costs and subsistence needs from country to country. Second, the core set fails to provide for effective enforcement. The ILO can appeal to the conscience of the world, but that is often a weak reed against the lure of seeming competitive advantage for a country with substandard wages. The World Trade Organization (“WTO”) has a variety of trade sanctions it can impose against the violators of trading or *property* rights,⁶⁷ but the ILO has no counterpart in dealing with violations of worker or *human* rights.

For many persons, the first basis for recognizing international labor rights is a moral one. They are inherent in the dignity and worth of the individual human being. That is the same rationale as the rationale for the *Universal Declaration of*

⁶⁵ International Labor Organization [ILO], *Declaration on Fundamental Principles and Rights at Work*, ¶ 2 (June 1998), available at <http://www.ilo.org/public/english/standards/relm/ilc/ilc86/com-dtxt.htm>. Paragraph 5 disclaims any use of the Declaration for “protectionist” purposes. *Id.* ¶ 5.

⁶⁶ For a persuasive argument that “core” rights should also include protections against ultra hazardous working conditions and special protections for migrant workers as well as subsistence wage levels, see Sarah H. Cleveland, *Why International Labor Standards?*, in INTERNATIONAL LABOR STANDARDS: GLOBALIZATION, TRADE, AND PUBLIC POLICY 129, 156–59 (Robert J. Flanagan & William B. Gould IV eds., 2003). Cf. William B. Gould IV, *Labor Law for a Global Economy: The Uneasy Case for International Labor Standards*, in INTERNATIONAL LABOR STANDARDS: GLOBALIZATION, TRADE, AND PUBLIC POLICY, *supra*, at 81.

⁶⁷ *Understanding the WTO: Settling Disputes, A Unique Contribution*, WORLD TRADE ORG., http://www.wto.org/english/thewto_e/whatis_e/tif_e/displ_e.htm (last visited Oct. 10, 2012).

Human Rights,⁶⁸ adopted by the United Nations in 1948. The *Universal Declaration* itself spells out a number of labor rights, including the "core" rights of nondiscrimination in employment, the right to form labor organizations, and the prohibition of slavery and child labor.⁶⁹ Without explicitly using the term "living wage," Pope Leo XIII in the encyclical *Rerum Novarum* would have added that right when he stated: "[T]here underlies a dictate of natural justice more imperious and ancient than any bargain between man and man, namely, that wages ought not to be insufficient to support a frugal and well-behaved wage-earner."⁷⁰ The Pope went on to say that the amount should be enough to support the wage-earner's spouse and children. Yale Professor Thomas Pogge estimates that "modest institutional reform, affecting merely one percent of global income distribution, could overcome severe poverty," which he describes with grim specificity.⁷¹

Despite these grand pronouncements on human rights, I am skeptical enough about human motivations to fear that moral grounds, however exalted and appealing in the abstract, will not be sufficient to carry the day in the market place. Ultimately, I believe that an *economic* justification will be needed to rally support for an enforceable set of globally recognized worker rights. Here a principal champion has been Ray Marshall, former U.S. Secretary of Labor and later Professor of Economics at the University of Texas.

⁶⁸ Universal Declaration of Human Rights, G.A. res. 217 (III) A, U.N. Doc. A/810, at 71 (Dec. 10, 1948).

⁶⁹ *Id.*

⁷⁰ *RERUM NOVARUM*, *supra* note 6, at ¶ 45.

⁷¹ THOMAS POGGE, POVERTY AND HUMAN RIGHTS, *available at* http://www2.ohchr.org/english/issues/poverty/expert/docs/Thomas_Pogge_Summary.pdf. Citing United Nations and World Bank figures, Pogge declares:

"Out of a total of 6575 million human beings, 830 million are reportedly chronically undernourished Roughly one third of all human deaths . . . are due to poverty-related causes. . . . The global poor are 42 percent of the world's population with 1 percent of the global product. . . . (For the year 1998, Branko Milanovic [a World Bank lead economist] estimates income inequality between the top and bottom 10% of the human population to have been 320:1 in terms of market exchange rates . . .). . . . Eradicating severe poverty (relative to the [World Bank's] \$2/day poverty line) is a matter of raising the income of the poor from currently 2.3% of the average human income to 4%."

Id.

Marshall has argued that the establishment and enforcement of labor standards are key components of a high-skilled, high-wage, and value-added development strategy that promotes productivity and economic stability.⁷² The prosperity of the United States in the post-World War II era is cited as a prime example of this phenomenon. Collective bargaining and minimum wage laws sustained aggregate consumer demand and that in turn spurred solid economic growth. By contrast, countries that rely on low wages instead of skills development to attract investment will find restless investors moving elsewhere whenever they discover areas with still-lower wages. In the absence of international labor standards, however, the temptation for many countries will be irresistible to resort to the lure of low-wage costs to attract business and investment. The race to the bottom would be in full flight. In addition to offsetting that race to the bottom, internationally generated standards would have the advantage of allaying the fears of developing countries that the specified labor standards were simply a disguised exercise in protectionism on the part of the richest, most economically advanced nations.

Perhaps the crucial element would be a realistic set of mandatory minimum wage levels—in effect, a living wage. There obviously could not be a single universal standard. The requirements would have to be tailored to the wide variations in living standards and economic conditions throughout the world. At least a fair subsistence wage should cover the basic needs of a family, including food, shelter, clothing, health care, education, transportation, and savings.⁷³ The *European Social Charter* calls upon the member countries of the European Union to ensure all workers the right to “a fair remuneration sufficient for a decent

⁷² See, e.g., RAY MARSHALL, UNHEARD VOICES: LABOR AND ECONOMIC POLICY IN A COMPETITIVE WORLD 3–6 (1987). See also KIMBERLY ANN ELLIOT & RICHARD B. FREEMAN, CAN LABOR STANDARDS IMPROVE UNDER GLOBALIZATION? 89–92 (2003); Stephen Herzenberg, *In From the Margins: Morality, Economics, and International Labor Rights*, in HUMAN RIGHTS, LABOR RIGHTS, AND INTERNATIONAL TRADE 99, 99–100, 114 (Lance A. Compa & Stephen F. Diamond eds., 1996).

⁷³ See, e.g., WORKER RIGHTS CONSORTIUM, MODEL CODE OF CONDUCT § 3.C.1 (2005), available at <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1003&context=codes&sei-redir=1#search=%22Model%20Code%20conduct%2C%20Workers%20Right%22>. The *Worker Rights Consortium, Model Code of Conduct* was developed by the Worker Rights Consortium for application to manufacturers of wearing apparel and other institutional paraphernalia for American colleges and universities, wherever produced in the world.

standard of living for themselves and their families.”⁷⁴ Developing countries complain that any effort to impose such minima impairs their low-wage comparative advantage. The line may not always be easy to draw, but surely one exists between a particular economy’s appropriate competitive edge and the sheer exploitation of workers.

Existing United States domestic law does provide some means of enforcing minimum labor standards abroad. Thus, in the Generalized System of Preferences (“GSP”), Congress required developing countries to comply with “internationally recognized worker rights” in order to qualify for special tariff benefits.⁷⁵ And Section 301 of the 1974 Trade Act was amended in 1988 to impose on this country’s foreign trading partners the duty to observe “core” labor rights and provide for minimum wages.⁷⁶ But enforcement of the Trade Act has often been lax, especially with such substantial trading countries as China.⁷⁷ More recently, in “free trade” agreements with Peru, Korea, and various Central and South American nations, the U.S. has secured commitments to enforce either domestic labor law or ILO core labor standards.⁷⁸ The European Union (EU) and certain African, Caribbean, and Pacific nations have “reaffirm[ed] their commitment” to the ILO’s core labor standards in the so-called

⁷⁴ Eur. Consult. Ass., *European Social Charter (revised)*, STE 163 (1996), available at <http://www.coe.int/t/dghl/monitoring/socialcharter/presentation/escrbooklet/English.pdf>. See Charter of Fundamental Rights of the European Union art. 31, 2000 O.J. (C 364) 1, 15, available at http://www.europarl.europa.eu/charter/pdf/text_en.pdf (which, unlike the *Social Charter*, applies to all EU countries).

⁷⁵ 19 U.S.C. § 2462(b)(2) (2006). Congressional authorization for the GSP expired on December 31, 2010, but was reauthorized on October 21, 2011 through July 31, 2013. See *Generalized System of Preference (GSP)*, OFFICE OF U.S. TRADE REPRESENTATIVE, <http://www.ustr.gov/trade-topics/trade-development/preference-programs/generalized-system-preference-gsp> (last visited Oct. 10, 2012).

⁷⁶ 19 U.S.C. § 2411(d)(3)(B)(iii).

⁷⁷ WILLIAM H. COOPER, CONG. RESEARCH SERV., R41145, THE FUTURE OF U.S. TRADE POLICY: AN ANALYSIS OF ISSUES AND OPTIONS FOR THE 112TH CONGRESS 12–13 (2011).

⁷⁸ See generally Huma Muhaddisoglu & Mark Kantor, *Background on US and EU Approaches to Labor and Environment Chapters in Free Trade Agreements*, in OECD GLOBAL FORUM ON INTERNATIONAL INVESTMENT VII, 4–7, 66–72 (2008); Free Trade Agreement, U.S.-Korea, art. 19.3, Oct. 12, 2011, available at http://www.ustr.gov/sites/default/files/uploads/agreements/fta/korus/asset_upload_file934_12718.pdf.

“Cotonou Agreement,” and the EU has negotiated less specific nondiscrimination employment conditions in trade agreements with Albania, Egypt, and Russia.⁷⁹

Nonetheless, in today’s rapidly expanding and complex global markets, and with the increasing power and business flexibility of multinational corporations, the capacity and willingness of any government to enforce labor standards unilaterally is severely limited. Some system of international enforcement is needed. As discussed earlier, the ILO is the international body charged with promulgating substantive labor standards, and technically they are legally binding on ratifying member states.⁸⁰ But the ultimate enforcement power of the ILO is practically nil. Its appeal is to a nation’s conscience, its national pride, and concern about the reputation the country enjoys among the other nations of the world. On the other hand, the World Trade Organization does indeed have the authority to impose such sanctions as fines or embargoes on countries that violate WTO rules by committing unfair trade practices. The ideal, in my mind, would be to have the “core” labor standards that are developed by the ILO become enforceable by the WTO. Violations would constitute unfair trade practices.⁸¹

Such trade-labor linkage has been heatedly opposed by a variety of interested parties. For free marketers, it amounts to a matter of ideology. Any value other than pure laissez-faire, whether it be labor rights or environmental quality, must be brushed aside as an unjustified and harmful intrusion on global trade. The lessons we have learned about the importance of government regulation of markets within countries are dismissed

⁷⁹ See Muhaddisoglu & Kantor, *supra* note 78, at 50–65.

⁸⁰ All ILO members are bound by the organization’s Constitution. Individual conventions are binding only on the countries that ratify them. The United States is notorious for the small number of conventions it has ratified. The U.S. has not even ratified such basic conventions as those guaranteeing freedom of association, for example, the right to form labor unions (ILO Convention 87) and the right to engage in collective bargaining (ILO Convention 98).

⁸¹ Despite the WTO’s rejection to date of trade-labor linkages, the inaugural Singapore Ministerial in 1996 committed the WTO’s members to observance of “internationally recognized core labour standards” and encouraged the WTO and ILO Secretariats to “continue their existing collaboration.” World Trade Organization, Singapore Ministerial Declaration of 18 December 1996, WT/MIN(96)/DEC (1996), *available at* http://www.wto.org/english/thewto_e/minist_e/min96_e/wtodec_e.htm. For a masterly analysis of the legal and practical problems in a trade-labor linkage, see generally Christopher McCrudden & Anne Davies, *A Perspective on Trade and Labor Rights*, 3 J. INT’L ECON. L. 43 (2000).

as inapplicable to the international scene. A second major group resisting any trade-labor linkage consists of the developing countries. They are convinced that any linkage is inherently protectionist and designed to deprive them of their natural low-wage comparative trade advantages.

Protectionist tendencies plainly exist in the richer countries, as exemplified by steel tariffs in the United States and agricultural tariffs elsewhere.⁸² But that does not mean that all trade-labor linkage is protectionist. A good part of it is based on a genuine, disinterested concern for the physical and economic well-being of workers worldwide. If practically minded scholars like Ray Marshall and Robert Kuttner are right that governmental (or, here, intergovernmental) regulation of the market may enhance rather than impede productive efficiency and promote consumer demand, the most utilitarian grounds also exist for enforcing the ILO's core labor standards, expanded to include a living wage. Such a marriage of morality and enlightened self-interest deserves the support of everyone who wishes to promote both workers' rights and a stable global economy.

CONCLUSION

I close on an ominous note with a cautionary tale. A half century or so ago, at the height of the Cold War, I encountered the most chilling article I have ever read. The authors were a pair of Cambridge University scientists, and they had developed, no doubt at least partly tongue-in-cheek, an elaborate mathematical formula for predicting the end of the world. Their premise was that there must have been other intelligent life in the vastness of the universe. Their theory was that since Carl Sagan and others had been unable to detect messages from these aliens, they must be extinct. The scientists' conclusion was that about the time any such creatures learned how to communicate across space, they also learned how to destroy themselves—and

⁸² See generally Alisa DiCaprio, *Are Labor Provisions Protectionist?: Evidence from Nine Labor-Augmented U.S. Trade Arrangements*, 26 COMP. LAB. L. & POL'Y J. 1 (2004); JOSEPH A. MCMAHON, AGRICULTURAL TRADE, PROTECTIONISM AND THE PROBLEMS OF DEVELOPMENT: A LEGAL PERSPECTIVE 210–11 (1992); see Andrew Pollack, *In a Move To Open Its Markets, China Pledges To Cut Tariffs*, N.Y. TIMES, Nov. 20, 1995, at A11, reprinted in FREE TRADE VERSUS PROTECTIONISM 119, 119–121, 127–29 (Henri Miller ed., 1996).

had done so. Our learning curve tracked theirs. The formula the Cambridge pair had constructed allowed earth about another 100 years. That would now leave us around fifty years to go.

I was in Washington, D.C. at the time of the Cuban missile crisis. Perhaps naively, I never thought that there was a real threat of a nuclear Armageddon. The Russians were rational beings and craved national suicide no more than we did. I do not feel that way about some of today's international terrorists. If they could destroy Western civilization at the risk of obliterating our planet, extremists among them might well do it. In the next half century, any determined group is going to be able to make or acquire weapons of mass destruction—nuclear or biological or otherwise. The Cambridge scenario is no longer mere fantasy.

My candidate for the most pervasive global *human* problem—as distinct from nature's environmental problems—is the gaping, shameful disparity in income and wealth among earth's peoples.⁸³ It is the ultimate source of much of the envy, humiliation, and rage that lay behind "9/11" and that lies behind the maddened suicide attacks that continue to terrorize the world.⁸⁴ In my view, few things would do more to excise this cancer than the institution of a universal living wage and a dispute resolution system to enforce it. The accomplished, creative group assembled for this Symposium is fully capable of meeting a stirring moral challenge: to take a few further steps along the path toward more effective systems for dealing with conflicts in employment and conflicts over wealth distribution. That may ultimately be one of the best ways of dealing with conflicts among the peoples of the world. Needless to say, I

⁸³ See POGGE, *supra* note 71 and accompanying text. See also *Poverty*, THE WORLD BANK, <http://data.worldbank.org/topic/poverty> (last visited Oct. 10, 2012); Gillian MacNaughton & Diane F. Frey, *Decent Work for All: A Holistic Human Rights Approach*, 26 AM. U. INT'L L. REV. 441, 442–43 (2011); Jomo K.S., *The Inequality Predicament*, UN MONTHLY CHRON., Mar.–May 2006, at 51, 51; ROBERT J. SHILLER, *THE NEW FINANCIAL ORDER: RISK IN THE 21ST CENTURY* 63–65, 149 (2003).

⁸⁴ Events of the magnitude of 9/11 and today's widespread terrorism usually have multiple causes. See, e.g., Peter Bergen, *What Were the Causes of 9/11?*, PROSPECT MAG., (Sept. 24, 2006), <http://www.prospectmagazine.co.uk/2006/09/what-were-the-causes-of-911>. Supposed U.S. and Western threats to Islamic culture have undoubtedly been a motivating factor. *Id.* But poverty makes fertile ground for fostering such fears. *Id.* It is no refutation that the 9/11 jet hijackers were not poor themselves. *Id.* From the Caesars to Engels and Lenin, the instigators of "peoples' revolutions" have often come from the gentry.

expect no miracles even from this notable collection of talents. And of course there is no single perfect solution. But remember—Cambridge's putative doomsday clock may still be ticking! We can and must move forward.